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In The

Supreme Court of the United States

October Term, 1995

CANDY SADDLER CARTER,

Petitioner,

v.

MONTANA DEPARTMENT OF TRANSPORTATION AND STATE OF MONTANA,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does an Indian retailer have standing—without joining the distributor or her Tribe—to allege that the State's privilege tax on distributors' sales transactions of gasoline is preempted by federal law especially in regard to the Indian trader statutes (25 U.S.C. §§ 261-264)?

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MONTANA DEPARTMENT OF TRANSPORTATION AND
STATE OF MONTANA,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

Petitioner Candy Saddler Carter respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Montana, entered in this proceeding on November 13, 1995, which affirmed the District Court's granting of summary judgment based on Ms. Carter's lack of standing.

OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 905 P.2d 1102 (MT 1995) and is reproduced in Appendix [App.] at 9a to 17a. The decision of the Montana First Judicial District Court, Lewis and Clark County, was entered on October 26, 1994, and is reproduced in App. at 1a to 8a.

STATEMENT OF JURISDICTION

The opinion of the Montana Supreme Court was entered on November 13, 1995. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

The Commerce Clause, U. S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATUTES

Sections 261 to 264, Title 25, U. S. Code; with special emphasis on section 261:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

Section 104, Title 4, U. S. Code, with special emphasis on subsections 104 (a) and (b) (Hayden-Cartwright Act):

> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.
>
> (b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a

written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

....

STATEMENT OF THE CASE

Ms. Carter, the Petitioner, filed this action for declaratory and injunctive relief on October 6, 1992 asking the court to declare that the State had no taxing jurisdiction over sales of gasoline on the Rocky Boy's Reservation, based on federal law. If right, she asserted, the State had been unjustly enriched by the amount of $202,101.61 in gasoline taxes—that she had 'paid' (for the years 1988-1992) to her distributor, Montana Refining Company [MRC], in order to get the gasoline—which MRC, the "Indian trader", submitted to the State.

Ms. Carter raised the federal questions in her COMPLAINT [Compl.]) before the district court, and in her opening brief (BRIEF OF APPELLANT) before the Montana Supreme Court. Counsel on both sides argued the relevance of the Indian trader statutes and the Hayden-Cartwright Act in oral arguments before the district court.

During oral arguments, counsel for both sides discussed the scope of the federal statutes in issue at length with the judge who asked State counsel to respond to the pertinent questions raised by Ms.

Carter. None of these matters made its way into either court's decisions.

Both courts did not address Ms. Carter's fundamental assertion that she had standing to assert that the State had no tax jurisdiction over her. Ms. Carter cited two Montana Supreme Court cases as precedent: Grossman v. Montana, 209 Mont. 427, 438-439, 682 P.2d 1319, 1325 (1984) and Olson v. Dept. of Revenue, 223 Mont. 464, 471-75, 726 P.2d 1162, 1167-69 (1986). Grossman v. Montana was cited by Justice Nelson as a case contrary to his concurring opinion in this case. Carter v. Montana Dept. of Transportation, 905 P.2d 1102, 1106 (Mont. 1995). (App. at 16a). Olson v. Dept. of Revenue was cited throughout the higher court's decision but on other grounds.

The Montana Court never explained why it addressed plaintiff Olson's very similar *constitutional* claim under the Buck Act (4 U.S.C. §§ 105-110)) that he had standing to assert that the State had no tax jurisdiction inside federal enclaves. *See* Olson v. Dept. of Revenue, *ibid.*

Ms. Carter also asserted, citing the Hayden-Cartwright Act, that she had standing under the governing principles of Indian law as construed by the Montana Supreme Court: "We find from an examination of relevant statutes that such cession (*of Indian reservation jurisdiction*) to Montana as to taxation has not occurred." LaRoque v. Montana, 178 Mont. 315 (1978).

The district court and the Montana Supreme Court never addressed the above-mentioned arguments. They adopted the State's position on

state statutes verbatim, concluding that "[w]hether Carter is personally harmed by the gasoline tax statutes depends on where the legal incidence of the tax falls." DECISION AND ORDER [ORDER] (App. at 4a). Finding that the legal incidence fell on MRC, the distributor, and there was no statutory pass-through (to the customer) provision, See e.g. California Bd. of Equalization v. Chemehuevi Tribe, 474 U.S. 9, 11 (1985), the district court granted the State's Motion For Summary Judgment. ORDER (App. at 7a).

Furthermore, totally ignoring ample Montana Supreme Court precedent, Larson v. State, 166 Mont. 449, 534 P.2d 854 (1975); U. S. Nat'l Bank of Red Lodge, 175 Mont. 205, 208-09, 573 P.2d 188, 190 (1977) (citing Larson v. State); and A. C. Rierson v. State of Montana and Bd. of Admin. of PERS, 191 Mont. 66, 71, 622 P.2d 195, 198 (1981), regarding exhaustion of administrative remedies, the district court found that Ms. Carter's claims for a refund were "not properly before this Court." Id, at 9.

Following suit, the Montana Supreme Court ignored Petitioner's claims regarding standing. Distinguishing Oklahoma Tax Comm'n v. Chickasaw Nation, ___ U.S. ___, 115 S.Ct. 2214 (1995) (Oklahoma places the legal incidence on the retailer) [*Chickasaw*], Montana's high court found that the State placed the legal incidence on the distributor and merely reiterated the district court's determination that wherever the Montana legislature placed the legal incidence of the tax, that finding would determine the issue of standing, and actually the merits of the case. 905 P.2d, *supra*, at 1105 (App. at 14a).

This petition for certiorari seeks review of the Montana Supreme Court's affirmance of the district court's grant of summary judgment to the Respondents.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of the State of Montana has decided an important federal question in a way that conflicts with or undermines other state courts and conflicts or competes with relevant decisions of this Court.

A. Montana's decision conflicts with or undermines decisions in New York, North Dakota, New Mexico, Arizona, and Idaho regarding the power of a state to collect gasoline taxes on Indian Reservations.

The Montana Supreme Court's decision (i.e. analysis and result) conflicts or undermines rulings handed down in at least five states: **New York** (Herzog Bros. Trucking, Inc. v. State Tax Comm'n, 69 N.Y.2d 536, 516 N.Y.S.2d 179, 508 N.E.2d 914 (1987) [***Herzog Bros. I***](motor fuel tax pre-empted by Indian trader statutes), *vacated and remanded*, 487 U.S. 1212, 108 S.Ct. 2861, 101 L.Ed.2d 898 (1988), on remand 72 N.Y.2d 720, 536 N.Y.S.2d 416, 533 N.E.2d 255 (1988) [***Herzog Bros. II***]); **North Dakota** (White Eagle v. Dorgan, 209 N.W.2d 621, 622-623 (N.D. 1973)) (State has no power to collect taxes from an Indian residing on an Indian reservation); **New Mexico** (Laguna Industries, Inc. & Raytheon Services Co. v. New Mexico Taxation & Revenue Dept., 114 N.M. 644, 845 P.2d 167 (1992) [***Laguna***], *aff'd sub nom.* New Mexico

Taxation & Revenue Dept. v. Laguna Industries, Inc., et al., 115 N.M. 553, 855 P.2d 127 (1993) (no state gross receipts tax on transactions within scope of Indian trader statutes)); **Arizona** (State ex rel. Dept. of Revenue v. Dillon, 826 P.2d 1186, 1193 (Ariz. Ct. App. 1991), *review den.*, ___P.2d ___ (Ariz. 1992) (no tax on the receipts of a sale to reservation Indians on the reservation; *Warren Trading Post* and *Central Machinery* apply); and **Idaho** (Mahoney v. State Tax Comm'n, 96 Idaho 59, 524 P.2d 187, 191 (1974), *cert. denied* 419 U.S. 1089, 95 S.Ct. 679 (1974) (no jurisdiction to levy tax on reservation)).

Petitioner informs this Court at the outset that her counsel has found no precedent in caselaw dealing with gasoline taxes where an Indian retailer (and tribal member) was the sole plaintiff seeking relief.[1] Both the distributor and the Tribe refused to join this case. This Court has never been presented with this scenario. Therefore, this Court can decide a case that affects all Indian retailers in the United States whose businesses are located on their own Tribe's Reservation. It is Petitioner's understanding that there are a higher percentage of individual Indian retailers than there are tribal retailers. This case can determine if they can seek relief in their own right.

Petitioner confines her argument to a comparison between Montana and New York since New York has numerous decisions construing the Indian trader statutes, two on which this Court has granted certiorari. We primarily confine our

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[1] In White Eagle v. Dorgan, *supra*, one of the plaintiffs included plaintiff Bailey, a tribal member who, like Ms. Carter, was an owner/operator of a service station.

discussion here to one of those rulings: ***Herzog Bros.***, *supra*.

Notwithstanding the fact that the legal incidence of the New York motor fuel tax was on the wholesale distributors (i.e. like MRC in this case), the Court of Appeals decided the issue based on plaintiffs' allegation that New York was

> "that the State of New York is without power to regulate or interfere with sales of motor fuel by Herzog to Indians on Indian reservations ..."

Herzog Bros. I, 516 N.Y.S.2d, at 181.

This Court granted the State Tax Commission's writ of certiorari to review this decision and invited the Solicitor General to submit a brief amicus curiae who concurred with the Court of Appeals' ruling, who noted that

> "insofar as the statutory scheme required it to prepay taxes on fuel that would ultimately be sold to Indian retail customers on the reservation, in effect requiring the routine payment of an invalid tax, it imposed an impermissible burden.... (with the exception that) [he] contended that cases permitting the imposition of minimal burdens of collection (from non-Indian retail customers) on Indian retailers would justify the imposition of similar burdens on Indian traders, parties one step further removed from the taxable event in the chain of distribution."

Herzog Bros. II, supra, 536 N.Y.S.2d at 418, 533 N.E.2d 255. The Solicitor General's views were adopted sub silencio by this Court in Dept. of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc., 114 S.Ct. 2028 (1994) [***Milhelm***].

This Court remanded ***Herzog Bros. I*** back to the Court of Appeals "for an opportunity to reconsider ... in light of new regulations proposed by the Commissioner of Taxation and Finance..." 536 N.Y.S.2d, at 418. The Court of Appeals found consideration of the new regulations untimely and reaffirmed its prior ruling based on preemption of state laws by the Indian trader statutes under the Supremacy Clause, and not based on the legal incidence of the tax.[2]

In New York's courts, Ms. Carter apparently has standing to allege that this is "an invalid tax" under the Indian trader statutes. New York and Montana's decisions (and analyses) need to be distinguished, and, since this Court's analyses of the Indian trader statutes vis-à-vis the legal incidence seem to simultaneously affirm and overrule either State's decision, this Court should grant certiorari to reconcile these decisions.

B. The Montana Supreme Court's analysis conflicts or competes with relevant decisions of this

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[2] In regard to this Court's remand, the Court of Appeals assumed that this Court had embraced the New York court's construction of the law: "In the absence of a reversal by the Supreme Court, we assume that our interpretation of those decisions and our application of them to the facts before us represents the present state of the law on the subject." 536 N.Y.S.2d, at 418.

Court protecting tribal members' rights under the Indian trader statutes from impositions by the states.

The United States Supreme Court has steadfastly protected Congress' plenary power to "regulate Commerce ... with the Indian Tribes...",U.S. Const., art. I, sec. 8, cl. 3, and has consistently upheld Congress' "sweeping" and "comprehensive federal regulation" of trade with Indians that "bar States from taxing federally licensed Indian traders on their sales to reservation Indians on a reservation." Warren Trading Post Co. v. Arizona State Tax Comm'n., 380 U.S. 685, 687-690 (1965) [***Warren***]; *accord* Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 164 n.3, 165-166 (1980) [***Central Machinery***] ("precisely the same tax involved in *Warren Trading Post*"); *cf.* Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 481 & n.17, 482-483 (1976) [***Moe***] ("cigarette tax as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes." (cites omitted)); and Washington v. Confederated Tribes, 447 U.S. 134, 159-60 (1980) [***Colville***] (federal Indian trader statutes comprehensively regulate businesses selling to Indians).

Congress addressed trade with Indians in the very first Congress.[3] That federal trade protection extends to individual tribal members is an irrefutable presumption. *See e.g.* ***Central Machinery***, *supra*, at 165 (fundamental purpose is to protect Indians); *cf.* Rockbridge v. Lincoln, 449 F.2d 567 (C.A.9 (Ariz.) 1971) (class action suit by Indians) and U.S. ex rel. Hornell v. One 1976 Chevrolet Station Wagon, Serial No. 1L45U6S107585, 585 F.2d 978 (C.A. N.M. 1978)

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[3] Act of July 22, 1790, ch. 33, 1 Stat. 137 (1856).

(qui tam action). However, based on this Court's dicta in Chickasaw, this long-standing protection by Congress for over 193 years can be (ostensibly) circumvented by states simply based on where their legislatures place the 'legal incidence of the tax'. ***Chickasaw***, 115 S.Ct., at 2221.

It is this dicta that 'permitted' the Montana Supreme Court to abandon its own traditional analysis, *see e.g.* Northern Border Pipeline Co. v. State, 237 Mont. 117, 121-129, 772 P.2d 829, 831-836 (Mont. 1989), on questions concerning state tax jurisdiction in "Indian country" and 'cut to the chase', refusing even to listen to what Ms. Carter had to say.

If the Chickasaw Nation had invoked the protection of the Indian trader statutes below, the focus on legal incidence would have shifted, to federal preemption. "Since the transaction in the present case is governed by the Indian trader statutes, federal law preempts the asserted state tax." ***Central Machinery***, *supra*, at 165. This conclusion comports with the conditions that Justice Ginsberg's Majority Opinion placed on her analysis of the legal incidence of the tax:

> "The initial and *frequently* dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax. ... But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; *if* the balance of federal, state, and tribal interests favors the State, *and federal law is not to the contrary*, the State may impose its levy ... ." (emphasis added).

115 S.Ct., at 2220. See also supra note 15. This Court may correctly think that by her noting these qualifications in her Majority analysis, Justice Ginsberg's dicta necessitates no conflict with ***Milhelm***. Petitioner submits that the Montana courts did not see it that way. The Supreme Court of Montana is confused, indeed, did not even find it necessary to put on the record that the Indian trader statutes were invoked.

This Court has never stated that under 25 U.S.C. §§ 261-264, the legal incidence of a tax is dispositive; quite the contrary. *See* Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 844 & n.8 (1982) [***Ramah***]; *accord* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), *supra*; and ***Warren***, *supra*; *see also* Bd of Com'rs v. United States, 308 U.S. 343, 350 (1939) (a state will not be allowed to invade tax immunities of Indians no matter how skillful its legal manipulations) and Carpenter v. Shaw, 280 U.S. 363, 367 (1930) ("[I]n general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed ... the contrary is the rule to be applied to tax exemptions secured to the Indians.").

This Court has permitted state tax impositions on Indian traders' transactions with Indian retailers only when the consumers (never wholesalers) are non-Indians or non-tribal members evading lawful taxes:

> The specific kind of state tax ...which falls on non-Indian purchasers of goods ... stands on a markedly different footing from a tax imposed directly on Indian

> traders, on enrolled tribal members or tribal organizations ...

Milhelm, *supra*, at 2035. Petitioner falls squarely within the zone of interests this Court indicates here and has standing to seek judicial relief.

The Montana Supreme Court's decision also conflicts with or undermines Williams v. Lee, 358 U.S. 217 (1959) [***Williams***]. In ***Williams***, "the right of reservation Indians to make their own laws and be ruled by them" was a right secured in this Court by petitioners who were, like Petitioner here, individual Indians (a Navajo Indian and his wife who were defendants in an Arizona court), not the Tribe. Writing for the majority, Justice Black stated why the U.S. Supreme Court granted certiorari:

> The Supreme Court of Arizona affirmed, holding that since no Act of Congress expressly forbids their doing so Arizona courts are free to exercise jurisdiction over civil suits by non-Indians against Indians though the action arises on an Indian reservation. (cite omitted). Because this was a doubtful determination of the important question of state power over Indian affairs, we granted certiorari."

Id, at 218. Speaking for a unanimous court, Justice Black fortified his holding that state courts have no civil jurisdiction over Indian defendants by noting that,

> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on

> a reservation. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians ..."

Id, at 220. If the existence of the above-mentioned Indian trader statutes support the presumption that the State has no power to regulate on Indian reservations, then Petitioner has standing without more.

Under ***Williams***, if the State sues Petitioner (or any Indian retailer on a Reservation) for violations under the Montana Retail Motor Fuel Marketing Act, MCA § 30-14-804 (2), making retailers liable,[4] the State would have to sue her in the Chippewa-Cree Tribal Court. Furthermore, the State admitted that "the cost of doing business" language quoted above included "taxes". This anomaly creates a direct (state) interference with Indian trade on Reservations and explains why the legal incidence of the tax can not be dependent on state law.

2. Resolving this case has national implications since it will: inform native Americans that they are as equally protected as all other American citizens; remove all lingering doubts as to State tax jurisdiction regarding motor fuel transactions on Indian reservations; and clarify any conflicts or confusion regarding the comprehensive sweep of the Indian trader statutes.

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[4] "A retailer may not sell motor fuel at less than the delivered cost of the motor fuel plus the cost of doing business if the effect is to injure or destroy competitors or to injure or destroy competition or substantially lessen competition."

A. Native Americans and States need to know that all three branches of the federal government will protect Indian rights in state courts.

By granting certiorari to Petitioner, this Court will resolve the important but unanswered question as to whether or not the Hayden-Cartwright Act expressly authorizes States to tax motor fuel sales on Indian reservations. Furthermore, and perhaps more important, granting certiorari assures native Americans of equal protection under the law.

To deny certiorari sends a signal to native Americans that this Court's promises to uphold federal law does not include laws affecting individual Indians. "Our Constitution and our Civil Rights Act have guaranteed to" Indians ""the equal protection of the laws [which] is a pledge of the protection of equal laws." Hines v. Davidowitz, 312 U.S. 52, 69 (1941) (state authority over aliens).

The Washington Supreme Court recognized that Indians have constitutional as well as special federal rights:

> Indians not only have rights as citizens of states and of United States but ... additional rights, privileges and immunities vouchsafed them by contracts with the United States and implementing federal legislation."

Makah Indian Tribe v. Clallam County, 73 Wash.2d 677, 440 P.2d 442 (1968). Tribal members in Montana were told by the Ninth Circuit Court of Appeals that Montana courts can not supersede federal protection:

> "State law does not limit the relief available from the recognition of federal rights."

Dillon v. Montana, 451 F.Supp 168, 178 (1978), *rev'd on other grounds*, 634 F.2d 463.

This Court has recognized that states and state courts may be hostile to Indian claims, *see e.g.* United States v. Kagama, 118 U.S. 375, 384-385 (1886), but has observed that "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 571 (1983) [***San Carlos***].

Ms. Carter started her tax suit in state court based on federal law interpreting the application of the Tax Injunction Act (28 U.S.C. § 1341) to Indians. *see e.g.* Dillon v. Montana, 451 F.Supp 168, 178 (1978), *rev'd on other grounds*, 634 F.2d 463, despite her adamant belief that the state court had no jurisdiction over her claim and that it would unfairly judge her. Congress' recognition of her fears were acknowledged and discussed by this Court in ***San Carlos***. Justice Stevens, noting the federal safeguards provided Indian tribes by 28 U.S.C. § 1362,[5] observed:

> Congress thereby assured Indians a neutral federal forum—a guarantee

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[5] "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." (U.S.C.A. 1983).

> whose importance should not be underestimated. The Senate report noted, "There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years." S.Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966).

San Carlos, id, at 576 (Stevens, J., dissenting); see also Ibid, at n.8. Petitioner has standing to have her arguments distinguished, even if she is wrong.

B. Granting certiorari to determine standing under the Hayden-Cartwright Act will remove all lingering doubts as to State tax jurisdiction regarding motor fuel transactions on Indian reservations .

The Hayden-Cartwright Act has been on its way to a conclusion before this Court several times, but never was ripe for adjudication. Cases from throughout the United States include: ***McClanahan***, ***Bracker***, ***Ramah***, and, ***Chickasaw***. Granting certiorari and deciding this question tells individual Indians and Indian Tribes, and states whether Congress intended to allow states to tax motor fuel sales on Indian reservations or not. Many tribes and individual Indians are contemplating getting into the motor fuel distributor business. Would Indian distributors in Montana have to pay the state tax in Montana yet be exempt if delivering gas in New

York? Resolving these issues allows all sides to plan the future confident of their expectations.

The State has conceded that Ms. Carter has rightfully argued that the State has no tax jurisdiction without Congress' consent:

> Carter relies on the general rule prohibiting state taxation of tribal members without Congressional consent (cites omitted). Respondents concede this is the general rule of law, but assert that Congress has expressly authorized the taxation at issue herein through the Hayden-Cartwright Act ...

BRIEF OF RESPONDENTS at 23-24. *See* ***Chickasaw***, 115 S.Ct., at 2220 (absent cession of jurisdiction ... a State is without power to tax reservation lands and reservation Indians).

C. Granting certiorari will remove any conflicts or confusion regarding the comprehensive sweep of the Indian trader statutes.

The Indian trader statutes affect all Indians in "Indian country" and theoretically, all trade—present and future—between outsiders and Indians on Indian reservations. Commerce is the lifeblood of humanity and Congress has evinced (and this Court has upheld) an intent to encourage economic development on Indian reservations.[6] By granting certiorari, this Court can clarify what "a sweep as broad as [their] language" means in the context of a

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[6] *See* The Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. §§ 450 et seq.).

tribal member's standing to assert federal preemption in state court.

CONCLUSION

Granting certiorari on the standing issue will clarify "the right of reservation Indians to make their own laws and be ruled by them." ***Williams, supra.***

Determining whether or not an Indian retailer has standing to invoke the protection of these federal trade statutes makes it possible for interested parties on all sides—tribal, state, and federal—to envision (set budgets, plan construction, et al.) their respective and commingling economies for the future. Attorneys do not need to make their livings off this issue if this Court would just resolve the issues. Many tribal members and tribes want to get into the gasoline/diesel fuel business which is always co-extensive with convenient stores, and many times tied to plans for motels and casinos to accommodate truckers and tourists. The continuing entrepeneurial uncertainty would no longer linger if this Court grants certiorari and establishes the legal rights of all interested parties.

Respectfully submitted,

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February 7, 1995

APPENDIX

APPENDIX

Trial Court Decision

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

CANDY SADDLER CARTER,
Plaintiff,

Cause No. ADV 92-143

v.

MONTANA DEPARTMENT OF TRANSPORTATION AND STATE OF MONTANA,

Defendants.

Filed: October 26, 1994

The present matters before the Court are cross motions for summary judgment. Both motions raise essentially the same issues. The motions have been briefed and argued orally. They are ready for decision.

BACKGROUND

According to the record, Plaintiff (Carter) is a member of the Chippewa-Cree Tribes of the Rocky Boy's Reservation (the Reservation) in north central Montana. She lives in Box Elder, a community on the Reservation. Carter and a partner, Rose Jarvey, own and operate the "Pastime," a retail gas station and convenience store in Box Elder. Box Elder is near State highway No. 87, which runs from Great Falls to havre and passes through the northwest corner of the Reservation. Carter's customers

include tribal members, Indians living off the Reservation, and non-Indians, who purchase gasoline for highway and for off-highway use. Apparently Carter has not maintained records specifying amounts or proportions of gasoline sales to any of those groups.

Carter possesses a business license issued by the Chippewa-Cree Tribes. She is not licensed by the state of Montana as a gasoline distributor, nor is she an Indian Trader licensed by the Bureau of Indian Affairs.

On July 18, 1991, Carter applied for a tax refund for all gasoline sold by the Pastime in the years 1088 to 1990, pursuant to Section 15-70-225, MCA. That request was denied by the Montana Department of Transportation. Carter then filed an appeal with the State Tax Appeal Board. She did not proceed with that appeal to completion, instead filed this present court action.

In her complaint, Carter alleges that the gasoline tax imposed by the State of Montana on Montana Refining Company, a distributor, is unconstitutional as applied to sales by Indian vendors inside the Reservation, because the sales are preempted by federal law. She also alleges that she is denied equal protection because some of the customers may be entitled to off-road exemption under Section 15-70-221, MCA. She further alleges that the gasoline tax "burdens her privileges and rights under the Indian Commerce Clause ...." She further alleges that the gasoline tax "burdens her privileges and rights under the Indian Commerce Clause...." Although imposed on the gasoline distributor, the tax is included in the cost of the gasoline sold to Carter, who in turn passes the tax on to her customers.

DISCUSSION

Legal Standard

This Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay, and expense. Wagner v. Glasgow Livestock Sale Co., 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); Clarks Fork National Bank v. Papp, 215 Mont. 404, 496, 698 P.2d 851, 852-853 (1985); Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977).

Standing

Defendants assert that Carter lacks standing to challenge the validity of the gasoline tax. Specifically, Defendants contend that since the gasoline tax is imposed only on the distributor, the legal incidence of the tax falls only on the distributor. Thus, only the distributor has standing to challenge the validity of the tax.

The standing requirement for parties challenging validity of statutes is firmly established. Adopting federal principles of standing, the Montana supreme Court has stated:

> At the threshold of every case, especially those where a statutory or constitutional violation is claimed to have occurred, is the requirement that the plaintiff allege 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues ...' *Baker v. Carr* (1962) 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678.

Olson v. Dep't of Revenue, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986). The court stressed the requirement that the plaintiff show personal injury or immediate threat of such injury by the challenged constitutional or statutory provision. Id. The injury alleged must be personal to the

plaintiff, as distinguished from an injury suffered by the community in general. Id. (*citing* Warth v. Seldin, 422 U.S. 490, 502 (1975)).

The United States Supreme Court has strongly advised courts against adjudicating rights of third parties through persons not personally harmed by the challenged constitutional or statutory provisions, because the third parties are usually the best proponents of their own rights. moreover, this limitation on standing prevents litigation that the parties actually injured may not wish to pursue. Singleton v. Wulff, 428 U.S. 106, 113 (1976); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978).

Whether Carter is personally harmed by the gasoline tax statutes depends on where the legal incidence of the tax falls. Carter contends that she is personally affected because the tax imposed on the distributor is actually passed through to her, and in turn to her customers.

Determining where the economic burden of a tax ultimately rests, however, is not the same as determining where the legal incidence of the tax falls. United States v. Delaware, 958 F.2d 555, 561 (3rd Cir. 1992).

> The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision as to where the legal incidence of [an excise] tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer. The Court has laid to rest doubts on that score ..., at least under taxing schemes, as here, where neither

> statute required petitioner to pass the tax on to the purchaser-consumer.

Gurley v. Rhoden, 421 U.S. 200, 204 (1975). That case involved Mississippi's tax on the retail sale of gasoline. The person challenging the tax, an owner of several gasoline service stations, included both federal and state excise taxes in the retail price of the gasoline, thus passing the taxes on to the consumers. he asserted that the state sales tax, which was levied upon the "gross proceeds of the retail sales" of gasoline, should not be imposed upon the portion of the sales price attributable to excise taxes. The Supreme Court, however, concluded that the legal incidence of the excise taxes fell upon the producer, rather than upon the consumer, and therefore the state sales tax was properly imposed.

In interpreting taxing statutes, the court must look to all relevant circumstances, such as the intent of the taxing authority and the rights and obligations involved in the transaction being taxed. United States v. Delaware, 958 F.2d at 561.

With these principles in mind, the Court concludes that the legal incidence of the gasoline tax at issue falls upon the distributor and not the vendor or the consumer. It is a license tax, specifically imposed on gasoline distributors, that is based on the amount of gasoline sold. Under the statutory scheme contained in Title 15, chapter 70, MCA, the gasoline distributors are responsible for maintaining records of gasoline sold by them, and are solely responsible for remitting the tax to the Department of Transportation. Failure to pay the tax subjects only the distributor to penalties. Neither the vendor nor the purchaser is liable for the payment of the tax.

The tax revenue is distributed to the cities, towns and counties of the state to be used for construction and maintenance of highways, streets and roads. Section 15-70-

101, MCA. Persons who purchase gasoline for off-highway purposes or for use outside the state of Montana are eligible for refunds of the tax passed on to them by the distributor and the vendor. Section 15-70-221, MCA. However, this refund provision does not prove that the legislature intended the legal incidence of the tax be placed on the purchaser. As the Court noted in Gurley:

> Rather, since the proceeds of this tax go not into the general treasury but into a special fund used to defray the cost of the federal highway system, * * * the refunds authorized simply reflect a congressional determination that, because the economic burden of such taxes is traditionally passed on to the purchaser-consumer in the form of increased pump prices, farmers and other off-highway users should be relieved of the economic burden of the cost of the highway program, and that the cost should be borne entirely by motorists who use gasoline to drive on the highways.

421 U.S. at 206 (citations omitted).

Carter contends that Section 30-14-804 (2), MCA, requires the distributor to pass the tax through the vendor to the consumer. That provision, which is part of the Montana Retail motor Fuel marketing Act, states:

> A retailer may not sell motor fuel at less than the delivered cost of the motor fuel plus the cost of doing business if the effect is to injure or destroy competitors or to injure or destroy competition or substantially lessen competition.

A statutory "pass through" requirement need not be explicitly stated; the standard requires only a "fair

interpretation of the taxing statute as written and applied." California Bd. of Equalization v. Chemehuevi Tribe, 474 U.S. 9, 11 (1985). However, even if Carter's argument were valid, the legal incidence would fall on the consumer rather than the vendor unless the vendor were required to pay the tax upon the distributor's failure to do so. *See* United States v. Delaware, 958 F.2d at 561. Where a state requires that a vendor pass on the sales tax to the purchaser and collect tax from the purchaser, the legal incidence of the tax is deemed to fall upon the purchaser. United States v. State Tax Comm'n, 421 U.S. 599, 608 (1975). In this case, the Court concludes that the statute is not a required statutory "pass-through" for the gasoline tax. Rather, it is a general prohibition against selling gasoline below cost if competition is adversely affected.

In summary, the Court concludes that Carter is not personally aggrieved by the gasoline tax imposed by the state of Montana, because the legal incidence of the tax does not fall on her. Therefore, she does not have standing to challenge its validity.

Carter also contends that she is entitled to refunds for all gasoline sold by the Pastime, under Section 15-70-221, MCA. According to the parties' briefs, Carter's application for the refunds was denied by the Department of Transportation. Although initiating an appeal to the State Tax Appeal Board, she failed to follow it through. Section 15-70-111, MCA, sets forth the administrative procedure with regard to any order issued by the Department of Transportation. On that basis the District Court's jurisdiction over Carter's application for her refund is limited to judicial review of the decision of the State Tax Appeal Board. Thus, Carter's claim for refunds is not properly before this Court.

Since the Court has determined that Carter lacks standing to pursue this action, it is unnecessary to address the remaining issues presented in the cross motions.

ORDER

IT IS HEREBY ORDERED that judgment is GRANTED to Defendants. The above-entitled action is DISMISSED.

DATED this 26 day of October, 1994.

s/ Dorothy McCarter
District Court Judge

Montana Supreme Court Decision

No. 95-172

IN THE SUPREME COURT OF THE STATE OF MONTANA 1995

CANDY SADDLER CARTER,
Appellant & Plaintiff

v.

MONTANA DEPARTMENT OF TRANSPORTATION and
STATE OF MONTANA

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The honorable Dorothy McCarter, Judge presiding.

Decided/Filed: November 13, 1995

HUNT, Justice.

Plaintiff and appellant, Candy Carter appeals a decision and order from the First Judicial District Court, Lewis and Clark County, granting the defendant, the Montana Department of Transportation, summary judgment based on the appellant's lack of standing.

We affirm.

The sole issue on appeal is whether the District Court properly granted the Montana Department of Transportation summary judgment.

FACTS

The appellant, Ms. Carter, is an enrolled member of the Chippewa-Cree Tribe of the Rocky Boy reservation. She and her partner own and operate the "Pastime," a retail gas and convenience store located outside of Box Elder. Carter possesses a business license issued by the Chippewa-Cree. She is not licensed by the State of Montana as a gasoline distributor, nor is she an Indian Trader licensed by the Bureau of Indian Affairs. Carter receives her gas from the Montana Refining Company (MRC). MRC is a resident motor fuel distributor out of Great Falls.

The record is unclear as to when ms. Carter first contested the motor fuel tax, but the State does have a letter of protest from July 1991. At that time, Carter applied for a tax refund for all gasoline sold at her gas station in the years 1988 through 1990. The request was denied by the Montana Department of Transportation (MDT), so Carter then filed an appeal with the State Tax Appeal Board. She did not complete this appeal procedure.

On October 6, 1992 appellant filed an action against the MDT seeking declaratory and injunctive relief to have the court declare the State was without jurisdiction to require either the distributor or her to pay the motor fuel tax. Appellant also requested a refund of the taxes paid between 1988 and 1992.

In her complaint, Carter alleged the State's motor fuel tax was unconstitutional as applied to sales to Indian retailers (Tribal members) inside the boundaries of the Rocky Boy reservation because such sales are preempted by federal law. The District Court granted defendant's motion for summary judgment.

DISCUSSION

Our standard of review on a grant of summary judgment is identical to that of a trial court. Minnie v. City of Roundup (1993), 257 Mont. 429, 431, 849 P.2d 212, 214. Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56 (c), M.R.Civ.P. Courts use summary judgment to encourage judicial economy through the elimination of unnecessary trial, delay and expense. Engebretson v. Putnam (1977), 174 Mont. 409, 571 P.2d 368.

The District Court granted summary judgment in favor of the defendant for lack of the requisite standing to bring such a challenge. Initially, we acknowledge that a taxpayer who is directly and adversely affected by an assessment or levy of taxes has the necessary standing to challenge such a tax. State ex rel. Conrad v. Managhan (1971), 157 Mont. 335, 338, 485 P.2d 948,950.

Outside these special circumstances, the standing requirement for a party challenging the validity of statutes is firmly established. We have held that standing is the "threshold of every case, especially those where a statutory or constitutional violation is claimed to have occurred...." Olson v. Department of Revenue, 223 Mont. 464, 469, 726 P.2d 1162, 1166. The injury alleged must be personal to the plaintiff, as distinguished from an injury suffered by the community in general. Warth v. Seldin (1975), 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed. 343.

In this case, Carter contends she was personally affected by the tax because the tax affects her distributor, who then imposes the tax on her, which she in turn imposes on her customers. The District Court concluded Carter was not personally aggrieved by the gasoline tax. The court found whether Carter was personally harmed by the gasoline tax statutes depended on where the "legal

incidence" of the tax fell. The concept of legal incidence differs from the question of where the economic burden falls. United States v. Delaware (3rd Cir. 1992), 958 F.2d 555, 561.

Shortly before this case was submitted on briefs, the United States Supreme Court decided a case discussing "legal incidence." The Court considered the taxing authority of the State of Oklahoma over the Chickasaw nation, specifically whether the state could impose a motor fuel excise tax upon fuel sold by Chickasaw Nation retail stores on Tribal trust land. Oklahoma Tax Commission v. Chickasaw nation (1995), ___ U.S. ___, 115 S.CT. 2214, 132 L.ED.2d 400. In that case the Court held, "[t]he initial and frequently dispositive question in Indian tax cases ... is who bears the legal incidence of a tax." Chickasaw, 115 S.Ct at 2220.

As part of its analysis the Court looked at the language of the Oklahoma statute. The relevant statute in that case did not expressly identify who was to bear the legal incidence of the tax, whether it was the distributor, the retailer, or consumers; nor did the statute contain a "pass through" provision. A "pass through" provision would require distributors and retailers to pass on the cost of the tax to the consumer. Chickasaw, 115 S.Ct at 2221. The Oklahoma statutes were found to have ensured that the distributor was not burdened with the tax; distributors acted merely as "transmittal agents" for taxes imposed on the retailer. Chickasaw, 115 S.Ct. at 2222. The incidence of the tax rested with the retailer. Accordingly, since the retailer was Tribal, the tax infringed upon the right of Tribal self government. See, e.g. Bryan v. Itasca County (1976), 426 U.S. 373, 96 S.Ct. 21902, 48 L.Ed.2d 710.

Montana differs from Oklahoma in this respect. In Montana the relevant statute concerning the gasoline tax reads as follows:

15-70-204. (Temporary) Gasoline license tax - rate. (1) Every distributor shall pay to the department of transportation a license tax for the privilege of engaging in and carrying on business in this state in an amount equal to:

...

(b) for each gallon of all other gasoline distributed by the distributor within the state...

(i) 24 cents per gallon beginning July 1, 1993; and

(ii) 27 cents per gallon beginning July 1, 1994.

The statute clearly states the tax is to be paid by the distributor. The distributor is defined in the statutes as:

(6) "Distributor" means:

(a) any person who engages in the business in this state of producing, refining, manufacturing, or compounding gasoline for sale, use, or distribution;

(b) any person who imports gasoline for sale, use, or distribution;

(c) any person who engages in the wholesale distribution of gasoline in this state and chooses to become licensed to assume the Montana state gasoline tax liability;

(d) any exporter as defined in subsection (8);

(e) any dealer licensed as of January 1, 1969, except a dealer at an established airport;

(f) any person in Montana who blends alcohol with gasoline.

Therefore, anyone who distributes gas and licenses themselves as a distributor is subject to the tax. In this case

the retailer is not burdened with the tax because Carter is not a distributor. Since the dispositive language in Montana's statute clearly places the burden on the distributor, the legal incidence of the tax does not fall on Carter. Since Carter is unable to show she has been personally affected by this tax, she lacks the necessary standing to pursue this claim. Therefore summary judgment was appropriate.

We affirm the District Court's granting of summary judgment based on the appellant's lack of standing.

Affirmed.

s/ William E. Hunt, Sr.
Justice

We Concur:

s/ J. A. Turnage
Chief Justice

s/ William W. Leaphart
Justice

Justice James C. Nelson specially concurs.

I concur with the result of our decision but not in our analysis. in determining whether Carter was personally injured by the gasoline tax, we analyze where the legal incidence of the tax falls. Although the United States Supreme Court noted in Chickasaw that often the dispositive question in Indian tax cases is who bears the legal incidence of the tax, the legal incidence analysis goes to the merits of the taxation issue. Chickasaw did not involve a standing issue, and thus, properly resolved the taxation issue presented there on the basis of a legal incidence analysis. In the instant case, we need not and should not reach the merits, but need only affirm the District Court's grant of summary judgment based on the

Carter's lack of standing. Therefore, we should limit our analysis to standing and should not implicitly reach the merits of Carter's claims by addressing the legal incidence of the tax.

The sole issue on review is whether the District Court properly granted summary judgment to the Montana Department of Transportation. The District Court granted summary judgment because it found that Carter did not have standing to challenge the validity of Montana's gasoline license tax as applied to Indian retailers inside the boundaries of the Rocky Boy Reservation.

Standing is a justiciability doctrine designed to control access to the judicial system by determining who is entitled to have a case adjudicated. See Olson v. Department of Revenue (1986), 223 Mont. 464, 469-70, 736 P.2d 1162, 1166. Originating in Article VII, section 4 of the Montana Constitution, the standing doctrine limits judicial power to "cases at law and equity." This Court has interpreted "cases at law and equity" to embody the same limitations as the Article III "case or controversy" provision in the United States Constitution. Olson, 726 P.2d at 1166; Stewart v. Bd. of Cty. Comm'rs of Big Horn Cty. (1977), 175 Mont. 197, 201, 573 P.2d 184, 186.

The fundamental aspect of standing is that it focuses on the party seeking to get a complaint before a court and not on the issues the party wishes to have adjudicated. Flast v. Cohen (1968), 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, 961. Courts approach standing in two ways. The first approach focuses on the constitutional provisions of standing and the second approach focuses on the prudential restrictions that courts use to preserve judicial credibility and to deny standing. Olson, 726 P.2d at 1166; Valley Forge Christian College v. Americans United for Separation of Church and State (1982), 454 U.S. 464, 475, 102 S.Ct. 752, 760, 70 L.Ed.2d 700, 711.

At a minimum, the constitutional provisions require that a plaintiff be personally injured or be threatened with immediate injury by the alleged constitutional or statutory violation. Olson, 726 P.2d at 1166-67; Chovanak v. Matthews 91948), 120 Mont. 520, 526-27, 188 P.2d 582, 585. Thus, at the threshold of every case, especially those where a statutory or constitutional violation is alleged to have occurred, is the requirement that the plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." Northern Border Pipeline Co. v. State (1989), 237 Mont. 117, 129, 772 P.2d 829, 836; Olson, 726 P.2d at 1166 (quoting Baker v. Carr (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678). This personal stake requirement is dispositive. if a party seeking review is not among the injured, that party is not entitled to judicial review. Olson, 726 P.2d at 1166-67 (citing Sierra Club v. Morton (1972), 405 U.S. 727, 734-25, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636, 643); but see Grossman v. State, Dept. of Natural Resources (1984), 209 Mont. 427, 438-39, 682 P.2d 1319, 1325 (holding that in special circumstances, presenting issues of an urgent nature, this Court will accept original jurisdiction and drape the taxpayer with standing).

For example, in Olson, the appellants challenged the constitutional validity of certain statutes that require county residence to obtain benefits such as obtaining a fishing or hunting license or running for county office. The appellants were citizens of Montana but did not live within any county boundaries. Olson, 726 P.2d at 1166. We held that the appellants did not allege that the statutes injured them personally or threatened them with immediate injury. Therefore, they did not meet the threshold requirement of a personal stake in the outcome of the controversy.

Similarly, Carter challenges the constitutional validity of a statute imposing a gasoline license tax. See § 15-70-

204, MCA. That statute requires every distributor to pay a license tax for the privilege of engaging in and carrying on business within Montana. Importantly, the tax does not apply to a retailer. As a retailer, Carter was not among the injured and thus cannot allege a personal injury. Because she has not alleged the requisite personal stake in the outcome of the controversy, she is not a proper party before the court.

Where the legal incidence of the tax falls is immaterial for purposes of resolving the standing issue in this case, and our decision to affirm should not be grounded in analysis that is more appropriately directed to the merits of the taxation issues raised by Carter's complaint. Accordingly, I specially concur only in the result of our opinion.

s/ James C. Nelson
Justice

Justice Terry N. Trieweiler concurs in the foregoing special concurrence.

s/Terry Trieweiler
Justice

Supreme Court, U.S.
FILED
APR 2 1996
CLERK

No. 95-1408

In The

Supreme Court of the United States

October Term, 1995

CANDY SADDLER CARTER,

Petitioner,

v.

MONTANA DEPARTMENT OF TRANSPORTATION
and
STATE OF MONTANA,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an Indian retailer have standing – without joining the distributor or her Tribe – to allege that the State's privilege tax on distributors' sales transactions of gasoline is preempted by federal law especially in regard to the Indian trader statutes, 25 U.S.C. §§ 261-264?

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at *Carter v. Montana Department of Transportation*, 905 P.2d 1102 (1995) (Pet. App. 9a-14a.)

RELEVANT STATUTORY PROVISIONS

15-70-201 [1991]. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

. . . .

(5)(b) Gasoline imported into this state, other than that gasoline placed in storage at refineries or pipeline terminals, shall be deemed to be "distributed" after it has arrived in and is brought to rest in this state.

(6) "Distributor" means: (a) any person who engages in the business in this state of producing, refining, manufacturing, or compounding gasoline for sale, use, or distribution;

(b) any person who imports gasoline for sale, use, or distribution;

(c) any person who engages in the wholesale distribution of gasoline in this state and chooses to become licensed to assume the Montana state gasoline tax liability;

(d) any exporter as defined in subsection (8);

(e) any dealer licensed as of January 1, 1969, except a dealer at an established airport;

(f) any person in Montana who blends alcohol with gasoline.

. . . .

(8) "Exporter" means any person who transports, other than in the fuel supply tank of a motor vehicle, gasoline received from a refinery or pipeline terminal in Montana to a destination outside Montana for sale, use, or consumption beyond the boundaries of this state.

. . . .

(10) "Import" includes and means to receive into any person's possession or custody first after its arrival and coming to rest at destination within the state of any gasoline shipped or transported into this state from point of origin without this state other than in the fuel supply tank of a motor vehicle.

15-70-203 [1991]. License to sell gasoline on which refund may be claimed. (1) Any person other than a licensed distributor shall obtain a license from the department of transportation prior to selling gasoline on which a refund may be claimed. The application for license shall contain the applicant's name, address, place or places of business in the state of Montana, and other information which may be required by the department. Licenses issued shall bear a license number and the date of issuance. The department shall keep a record of all licenses issued, canceled, or suspended. A nontransferable license shall be issued and be effective until canceled or suspended by the department.

(2) Any person failing to comply with this section shall be subject to a fine of not less than

$25 or more than $200 or imprisonment in the county jail for a period not less than 10 days or more than 60 days or both fine and imprisonment.

15-70-204 [1991]. Gasoline license tax – rate. (1) Every distributor shall pay to the department of transportation a license tax for the privilege of engaging in and carrying on business in this state in an amount equal to 1 cent for each gallon of aviation gasoline, which shall be allocated to the department of transportation as provided by 67-1-301, as amended, and 20 cents for each gallon of all other gasoline distributed by him within the state and upon which the gasoline license tax has not been paid by any other distributor.

(2) Gasoline exported shall not be included in the measure of the distributor's license tax.

(3) Alcohol that is blended or is to be blended with gasoline to be sold as gasohol is subject to a tax per gallon equal to the license tax imposed on nonaviation gasoline distributors under subsection (1).

STATEMENT OF THE CASE

In 1992, Petitioner, a gasoline filling station retailer, filed a complaint against respondents Montana Department of Transportation and State of Montana, seeking a declaratory judgment that Montana was without authority to tax any gasoline distributor sales to on-reservation Indian retailers and monetary reimbursement for taxes apparently paid by the distributor from whom she buys

her gasoline. Aside from disputing Petitioner's position concerning the substantive issues of whether the Hayden-Cartwright Act, Pub. L. No. 74-686, 49 Stat. 1521 (1936) (codified as amended at 4 U.S.C. § 104(a)) was an express congressional authorization for states to tax the sale of gasoline on Indian reservations and whether the Indian trader statutes, 25 U.S.C. §§ 261-264, preempted and prohibited any state regulation which impacted on-reservation trade, Respondents contested her standing to challenge the tax's validity. The district court dismissed the complaint because, under Mont. Code Ann. § 15-70-204 (1991), the legal incidence of the tax fell on gasoline distributors, not retailers like Petitioner. The merits of her claim therefore were not addressed. (Pet. App. 5a-7a.)

Petitioner appealed to the Montana Supreme Court. Like the district court, it resolved the challenge on the basis of standing and did not address the merits of her claim. The Supreme Court reasoned that the dispositive language in Montana's statute clearly places the burden on the distributor and that Petitioner was unable to show that she has been personally affected by this tax. (Pet. App. 14a.)

Petitioner thus incorrectly asserts that "[b]oth courts did not address Petitioner's fundamental assertion that she had standing to assert that the state had no tax jurisdiction over her." (Pet. 5.) Both courts obviously did address standing, ruling against her on the issue. Since the only tax at issue was that imposed under § 15-70-204, any other tax jurisdiction was hypothetical. Montana courts, like their federal counterparts, do not resolve hypothetical disputes. *E.g., Olson v. Department of Revenue*, 726 P.2d 1162, 1166 (Mont. 1986) (applying federal

justiciability standards under Article VII, section 4 of the Montana Constitution).

REASONS CERTIORARI SHOULD NOT BE GRANTED

This Case Meets None of the Criteria for Review on Certiorari.

Rule 10.1 of this Court provides that review will be granted "only when there are special and important reasons therefor." Two of the considerations are whether the highest court of a State has decided a federal question in a way that conflicts with the highest court of another state or a United States court of appeals, and whether a state's highest court has decided an important federal question in a way that conflicts with applicable decisions of this Court. Petitioner alleges these factors exist and that review is appropriate. (Pet. 7, 10, 11.)

This case does not present any of these considerations. It does not involve a decision on a matter of federal law which conflicts with rulings of this Court, a United States court of appeals, or another state's highest court or present an important federal question which should be, but has not been, determined by this Court.

A. No Conflict Exists With Respect to the Standing Principles on Which the Decision Below Was Determined.

The cases Petitioner cites in support of her contention that a conflict over applicable standing principles exists

have nothing to do with standing. They instead deal with substantive issues of Indian taxation; i.e., they involve without exception the preemptive effect of the Indian trader statutes, 25 U.S.C. §§ 261-264, on commercial transactions with Indians on their reservations.

Herzog Brothers Trucking v. State Tax Commission, 508 N.E.2d 914 (N.Y. 1987), *vacated*, 487 U.S. 1212, *on remand*, 533 N.E.2d 255 (N.Y. 1988), did not implicate standing questions, but rather the scope of federal Indian trader statutes' preemption of state taxation of on-reservation trade with Indians. Similarly, *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973), addressed state taxation of on-reservation commerce conducted by Indians on their own reservations. The plaintiffs were Indian traders and were the very persons from whom the state sought to collect the taxes in issue. The court therefore ruled on the substantive questions of preemption and taxation without addressing standing. In *Laguna Industries, Inc. v. New Mexico Taxation & Revenue Department*, 845 P.2d 167 (N.M. Ct. App. 1992), *aff'd*, 855 P.2d 127 (N.M. 1993), the court held that prior case law holding Indian trader statutes preempted imposition of state taxes upon on-reservation transactions with Indians applied to the services in issue, i.e., the preemption rule was not limited to transactions involving goods. Again, standing was not in issue.

Similarly, in *State ex rel. Department of Revenue v. Dillon*, 826 P.2d 1186 (Ariz. Ct. App. 1991), the issue was not standing, but whether the state could tax an enrolled member of a Washington tribe on sales he made on a reservation in Arizona to nontribal members of the Arizona tribe on whose reservation the sales were made. The

court there applied the reasoning of *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and found the taxes valid with respect to sales to non-Indians. Again, the incidence fell on the party before the court and standing was not in issue. Lastly, in *Mahone v. State Tax Commission*, 524 P.2d 187 (Idaho), *cert. denied*, 419 U.S. 1089 (1974), the plaintiff was the taxpayer. In that case, as in the others cited by Petitioner, standing was not at issue.

Indeed, the question whether there is conflicting authority on the issue of standing is answered by Petitioner's own admission when informing "this Court at the outset that her counsel has found no precedent in case law dealing with gasoline taxes where an Indian retailer (and tribal member) was the sole plaintiff seeking relief." (Pet. 8.) Her admission is wholly incompatible with the claim that, in some fashion, the Montana Supreme Court's decision creates a conflict of authority warranting this Court's attention.

B. No Substantial Federal Question Is Presented by the Decision Below.

Petitioner's claim that this case has national implications and that granting certiorari herein will clarify confusion over the scope of standing to challenge state taxes based on preemption by the Indian trader statutes is farfetched. None of the cases relevant here to the underlying substantive issue has recognized that a nontaxpayer may challenge a tax assessed on another where the party actually taxed has not joined in the challenge.

Petitioner instead seeks a sweeping pronouncement concerning "the legal rights of all interested parties,"

here apparently unnamed tribal members wishing to avoid what they believe is the economic incidence of Montana's gasoline tax. (Pet. 20.) The notion, however, that only distributors have standing to challenge the propriety of taxing gasoline sold on reservations to members of the resident tribe or the tribe itself is unremarkable and embodies no misapprehension of federal justiciability principles. "When a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Here, it is the distributor, not the retailer, whose legal interest is affected by the gasoline tax, and it is the distributor, not the retailer, which must challenge the tax's validity with respect to amounts delivered to Indian reservations for sale.

Petitioner cites no authority for the proposition, and none exists, that she may stand in the shoes of her distributor for the purpose of contesting the tax. The lack of such authority is not happenstance. A contrary conclusion would have the effect of scrapping established federal taxpayer-standing rules and opening state courts which, like Montana, follow federal justiciability principles when determining standing questions under their own state constitutions, to myriad third-party tax contests where the only actual injury-in-fact alleged is the economic harm associated with the pass-through of a tax to the ultimate consumer or to intermediate retailers like Petitioner. "The injury alleged must be personal to the plaintiff, as distinguished from an injury suffered by the community in general. *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197 (1975)." Such an expansion of federal standing

additionally would have the practical effect of expanding federal court litigation over state taxes since, to the extent state courts chose not to adopt liberalized federal standing standards, nontaxpayer plaintiffs could, and undoubtedly would, argue that "a plain, speedy and efficient remedy" within the state courts did not exist for purposes of applying the jurisdictional bar in 28 U.S.C. § 1341. Petitioner's proposed rule thus could have the anomalous result of giving nontaxpayers access to federal district courts when the actual taxpayer has none.

C. The Merits of Petitioner's Claim Are Not Before This Court.

Petitioner alleges that, "[b]y granting certiorari . . . , the Court will resolve the important but unanswered question as to whether or not the Hayden-Cartwright Act expressly authorizes States to tax motor fuels sales on Indian reservations." (Pet. 16.) This Court should not resolve that issue because the question here is standing, not whether the tax may be assessed against off-reservation distributors. There is no ruling below on this point for this Court to review. This Court should adhere to its usual rule that it will not address issues not resolved below. *Oklahoma State Tax Comm'n v. Chickasaw*, ___ U.S. ___, 115 S. Ct. 2214 (1995).

CONCLUSION

The petition for certiorari should be denied.

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